SUPREME COURT, U. S.

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In the

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-95

SHOUP VOTING MACHINE CORPORATION,
Petitioner,

v.

DATAMEDIA COMPUTER SERVICE, INC.,
Respondent.

NO. 71-128

AVM CORPORATION,
Petitioner,

v.

DATAMEDIA COMPUTER SERVICE, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT

Respondent, Datamedia Computer Service, Inc., prays that the Petitions for Writs of Certiorari filed by AVM Corporation ("AVM") and Shoup Voting Machine Corporation ("Shoup") be denied.

This case involves only a differing view of admitted venue facts which are fully stated in the opinion of the Court of Appeals. There is really no significant issue of law for this Court to consider. The Court of Appeals has not made a legal judgment inconsistent with decisions of this Court or in conflict with other Circuits.

The issue presented by Respondent to the Court of Appeals was:

> Whether a continuous period of sales of voting machines, service *and solicitation* within the Northern District of Texas by AVM, Shoup, and predecessor corporations of each, constitute "transacting business" under Clayton Act, Section 12. [Emphasis added].

The Court of Appeals merely held that the District Court erred in not considering the cyclical nature of sales in the voting machine business and the substantial, *continuing* sales solicitation activities of AVM and Shoup within the Northern District of Texas. As an example of AVM's sales solicitation activities that the District Court ignored, the Court of Appeals pointed out, 441 F. 2d at 607:

> AVM submitted a bid to Dallas County for the sale of four hundred eighty six voting machines at a price of $1,019,628, less rental credit of $45,000. However, this bid was unsuccessful, since the contract was awarded to Datamedia Corporation on a bid of $260,400. Had AVM received the Dallas County award that sale would have represented approximately 10% of its gross sales of $9,600,000 for 1968.

Numerous visits to county purchasing officials, bid submissions and related solicitation activities by AVM continue to this day.

As the Court of Appeals observed, 441 F. 2d at 607:

> When analyzing these activities, it must be remembered that the voting machine business is unusual in that most sales are made only every two years with the largest volume every four years. In such an industry solicitation is an essential element. It is readily apparent that AVM could not pop in on potential customers once every two or four years and hope to compete.

Shoup is in the same position as AVM although the duration of its business activities in the forum district is not as long as AVM's: From 1936 to 1968, Dallas exclusively used AVM voting machines (without competing bids from Shoup); Fort Worth has used Shoup voting machines since it discarded the exclusive use of paper ballots in 1964 (without competing bids from AVM).

Considering both the historic sales made in the forum district by AVM and Shoup and their substantial, continuing solicitation activities, the Court of Appeals properly held that AVM and Shoup are "transacting business" in the Northern District of Texas.

Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927); *United States* v. *National City Lines*, 334 U.S. 583 (1947) and *United States* v. *Scophony Corp.*, 333 U.S. 795 (1948) articulate clear standards to guide lower courts in their consideration of venue issues in antitrust cases. This is but one of many, many venue cases that have followed *Scophony*. The lower courts have had no difficulty applying *Scophony* to varying factual circumstances. There is no need for the legal concepts involved to be again considered by this Court.

Respondent wishes to get on with the merits of the case which was brought to recover damages for injuries sustained by it, after its incorporation, occasioned by Petitioners unlawful efforts to preclude Respondent's entry into the voting machine industry.[1]

The Complaint was filed March 14, 1969. In July, 1969, the District Court limited discovery to venue facts and appointed a Special Master to take evidence. Venue discovery was directed to be completed by September 22, 1969, but the District Court did not hear the venue motions until June 19, 1970. This appeal resulted from the District Court's decision dismissing the case for lack of venue, a decision that the Court of Appeals quite rightly reversed.

Voters in Dallas who have used AVM voting machines continuously since 1936 and voters in Fort Worth who have used Shoup voting machines for several years would be amazed to learn that AVM and Shoup were not "transacting business" in the forum district. Those voters would agree with the Court of Appeals, 441 F. 2d at 608, that:

> . . . Both appellees were transacting business in the Northern District of Texas within the meaning and purpose of Section 12 of the Clayton Act *at the time this suit was filed.* [Emphasis added].

[1] AVM's Petition argues the facts extensively. It contends that Respondent seeks damages for injury suffered by another. That is not true. Besides, the case at this time should not be concerned with the merits, but with venue only.

Accordingly, Respondent urges that the Petitions for Writs of Certiorari filed by AVM and Shoup be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAY M. VOGELSON, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Brief of Respondent In Opposition on counsel for Petitioners, by depositing same in the United States mails, postage prepaid, on August 10, 1971, addressed to Mr. Morris I. Jaffe, 1000 LTV Tower, Dallas, Texas 75201, counsel for AVM; and Mr. Jerry L. Buchmeyer, 2300 Republic National Bank Building, Dallas, Texas 75201, counsel for Shoup.

Original Signed By
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